

DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)  
AND THE U.S. ARMY CORPS OF ENGINEERS (NORTHWESTERN DIVISION)

PREPARED STATEMENT  
OF  
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&  
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FOR THE HEARING BEFORE THE  
UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS  
ON  
MISSOURI RIVER MASTER MANUAL

ROOM 485, RUSSELL SENATE OFFICE BUILDING  
10.00 AM; OCTOBER 16, 2003

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INTRODUCTION:

Mr. Chairman and Members of the Committee, I am George S. Dunlop and I am the Deputy Assistant Secretary of the Army for Civil Works (Policy and Legislation). Our office has the policy oversight responsibility for the Civil Works activities of the Army Corps of Engineers. I am accompanied by Brigadier General William T. Grisoli, Commander of the Northwestern Division of the U.S. Army Corps of Engineers (Corps). We are pleased to be here today to testify on the matter of reserved water rights and their inclusion in the Missouri River Master Water Control Manual (Master Manual) Review and Update.

The Master Manual is the guide used by the Corps to operate the six dams on the mainstem of the Missouri River: Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point. The first Master Manual was developed in 1960 as a guideline to help serve the authorized purposes of the mainstem system and was revised in 1975 and 1979. These revisions were undertaken to make needed changes that addressed issues with flood control operations criteria. The Corps is presently in the process of revising and updating the Master Manual to better serve the current needs of the basin, to comply with the current environmental laws, and to serve the congressionally authorized project purposes.

As part of the process to revise and update the Master Manual, a Revised Draft Environmental Impact Statement (RDEIS) was completed in August 2001. The RDEIS analyzed the environmental effects of a set of six alternative operating plans for the

Master Manual. The alternatives ranged from continuing current operations to major changes in the schedule for flow releases from Gavins Point Dam. To ensure effective coordination with stakeholders, workshops and hearings on the alternatives have been held at numerous locations across the basin. Moreover, there has been government-to-government consultation with the Missouri River Basin Tribes. This consultation process included Tribal workshops, and consultation meetings with Tribal chairmen and Tribal members. A listing of those activities from 1999 to the present is provided as Attachment A. We have received comments from Tribes, States, and other stakeholders on the six alternatives.

There are approximately 30 Native American Tribes located in the Missouri River Basin and 13 Tribal reservations located directly on the mainstem reservoirs, the river reaches between the reservoirs, and downstream of the mainstem reservoir system. In accordance with Federal laws and Department of Defense (DOD) policy, consultation with these Tribes has occurred throughout this process. The Corps is committed to continue to fulfill our legal responsibility to the Tribes and to continue to consult with Tribes, as sovereigns. As part of this commitment to ensure effective government-to-government consultation, we are conducting a Tribal Summit Meeting with Tribal leaders on October 31, 2003. In addition, the Corps is developing a programmatic agreement (PA) with the Tribes and the Advisory Council on Historic Preservation for the operation and management of the Missouri River Mainstem for compliance with Section 106 of the National Historic Preservation Act. This PA development process has included frequent meetings with Tribal members and direct input in the PA drafting process.

#### RESERVED WATER RIGHTS:

When lands are set aside for Indian reservations, whether by treaty, legislation, or executive order, water rights were often not explicitly defined. The courts have long recognized, however, that such reservation of land also reserves by implication unappropriated water related to that land in order to accomplish the purposes of the reservation. The doctrine of implied reservation of water rights was first articulated in the seminal Supreme Court decision, *Winters v. United States*, 207 U.S. 564 (1908). The Court found that the 1888 agreement and statute, which created the Fort Belknap Reservation in north-central Montana, implicitly reserved to the Tribe water from the Milk River for irrigation purposes. The nature and extent of these water rights vary based upon the particular Indian reservation with the objective of making the reservation a livable permanent homeland. *Arizona v. California*, 373 U.S. 546, 599 (1963).

#### QUANTIFICATION OF WATER RIGHTS IN THE MISSOURI RIVER BASIN:

Tribal water rights may be quantified through adjudication, a Congressionally ratified Tribal-State compact, or by direct Congressional action. Most Tribes within the Missouri River Basin, however, have not yet sought to quantify their reserved water rights under the *Winters* doctrine, although several Tribes in Montana and Wyoming are at various stages of the quantification process. The Corps does not have the responsibility to define, regulate, or quantify water rights or any other rights that the

Tribes are entitled to by law or treaty. The Corps does not attempt to do so in the current revision of the Master Manual, although the revision provides some flexibility to accommodate potential changes in water regimes.

#### ACCOMMODATING TRIBAL WATER RIGHTS IN THE MISSOURI RIVER BASIN:

Unless specifically provided for by Federal statute, quantification of water rights does not entail an allocation of storage at Corps reservoirs. The Corps recognizes, however, that the Tribes have claims to reserved water rights, and will, to the extent permissible by law, continue to operate the Mainstem Reservoir System in a way that does not preclude such claims.

The current Master Manual recognizes that streamflow use on the Missouri River is not static and addresses changes in its use accordingly. The Manual indicates that the establishment of Indian reservations in the late 19<sup>th</sup> century induced additional irrigation development, impacting the streamflow within the Basin.

For example, pursuant to the current Master Manual, when a Tribe exercises an established water right through diversion of water from the Mainstem Reservoir System for consumptive uses, then the Corps will treat such diversions as an existing depletion. This means that the Corps incorporates that depletion into its analysis of overall system depletions. By incorporating such information, the Corps can anticipate the manner in which depletions of water will affect system operations now and in the future, and plan for the amount of water that will be available to move through the system to meet the various project purposes while complying with applicable law.

The revised Master Manual will likewise incorporate such present and future depletions into its analysis on system operations. Specifically, the revised Master Manual will be flexible under its adaptive management provisions to account for any consumptive use of the Tribes at such time that their rights are quantified and finally established.

Finally, I would like to emphasize that the Corps fully recognizes the principles of Tribal sovereignty and the Federal Government's trust responsibility to the Tribes. The Corps will continue to engage in Government-to-Government consultation in order to take into account the quantified water rights of the Tribes in the operation of the Mainstem Reservoir System.

We appreciate having the opportunity to participate in this hearing, and look forward to hearing the testimony from Tribal leaders and any ideas they might have regarding the Master Manual revision effort, especially in regard to the overall consultation process and our consideration of Tribal water rights.

Mr. Chairman, this concludes our testimony. We would be pleased to answer any questions you or members of the Committee might have.

**ATTACHMENT A**  
**Coordination with Missouri River Basin Tribes (1999 to Present)**

**Tribal Hearings & Workshops on the RDEIS**

1. 10 October 2001 - Poplar, MT – Assiniboine & Sioux Tribes (Ft. Peck Tribes)  
Arlyn Headdress, Chairman, Ft. Peck Tribes
2. 24 October 2001 – New Town, ND – Three Affiliated Tribes  
Tex G. Hall, Chairman, Ft. Berthold Tribal Business Council
3. 30 October 2001 - Lower Brule, SD – Lower Brule Sioux Tribe  
Michael B. Jandreau, Chairman, Lower Brule Sioux Tribal Council
4. 3 December 2001 - Eagle Butte, SD – Cheyenne River Sioux Tribe (Workshop Only)  
Greg J. Bourland, Chairman, Cheyenne River Sioux Tribe

**Tribal Hearings on the RDEIS**

1. 30 January 2002 - Prairie Nights Casino, Ft. Yates, ND – Standing Rock Sioux Tribe  
Charles W. Murphy, Chairman, Standing Rock Sioux Tribe
2. 13 February 2002 - Eagle Butte, SD – Cheyenne River Sioux Tribe  
Greg J. Bourland, Chairman, Cheyenne River Sioux Tribe
3. 13 February 2002 - Poplar, MT – Assiniboine & Sioux Tribes (Ft. Peck Tribes)  
Arlyn Headdress, Chairman, Ft. Peck Tribes. This hearing also included a question and answer session.

**Tribal Consultation Meetings**

1. 27-28 July 1999 – Prairie Nights Convention Center on the Standing Rock Reservation – This Master Manual Study consultation meeting included participants from the Standing Rock Sioux Nation, Rosebud Sioux Nation, Crow Creek Sioux Nation, and the Commander and staff from the Missouri River Region of the Northwestern Division
2. 6 August 1999 - Spotted Bull Center on the Fort Peck Reservation – The Fort Peck Assiniboine and Sioux Tribes and the U.S. Army Corps of Engineers held a Master Manual consultation meeting on the Fort Peck Reservation.
3. 24 August 1999 – Fort Yates, ND – A Standing Rock Sioux Tribe – District of Fort Yates Master Manual consultation meeting was held with representatives from the Northwestern Division and the Omaha District Corps of Engineers attending.

4. 26 August 1999 – The Crow Creek Sioux Tribe and representatives from the Northwestern Division and Omaha District Corps of Engineers participated in a Master Manual consultation meeting.
5. 13 February 2002 - Poplar, MT – Ft. Peck Tribes and Master Manual Team had a government-to-government consultation on the RDEIS and the Spring Rise. The Fort Peck Tribes were to have representation from M.R.&I. Water Pipeline Dept., Environmental Protection Agency, Fish & Game Department, and Water Resource Department.
6. 29 April 2002 - Macy, NE – Omaha Tribe and the Master Manual Team had a government-to-government consultation meeting on the RDEIS.

### **Consultation Information Meetings**

1. 14 May 1998 – Rapid City, SD – Coordination and consultation meeting between the Mni Sose and Corps representatives from the Northwestern Division and the Omaha District.
2. 10 September 1998 – Mni Sose Intertribal Water Rights Coalition Board of Directors meeting with 23 Tribes represented and the Commander and staff from the Missouri River Region of the Northwestern Division.
3. 16-18 June 1999 – Flandreau, SD – Mni Sose Intertribal Water Rights Coalition Board of Directors meeting was held with representatives from the Northwestern Division participating.
4. 13-14 September 1999 – Mandan, ND – The Mni Sose Intertribal Water Rights Coalition Board of Directors held an information meeting and the Commander of the Missouri River Region of the Northwestern Division provided an update on Master Manual.
5. 22 November 1999 – Oglala Sioux Tribe and the Corps meet to discuss Government-to-Government consultation with the Tribe on the Master Manual Study. The Commander of the Missouri River Region of the Northwestern Division provided the Tribe with information on the study. The Oglala Sioux Tribe did not consider this meeting to be a consultation meeting.
6. 15-17 February 2000 – Aberdeen, SD – Great Plains Tribal Leaders – Federal Agency Conference – The Omaha District Commander, a representative from the ASA(CW), and staff from the Northwestern Division participated in a conference sponsored by the Great Plains Regional BIA to exchange information and to develop strategies to improve services to Basin Tribes.

7. 7-8 August 2000 – Fort Peck Reservation – Corps representatives held an information and consultation meeting with the Fort Peck Assiniboine and Sioux Tribes.
8. 11 September 2000 – Bismarck, ND – Chairmen of the Standing Rock Sioux and Three Affiliated Tribes met with the Commander of the Northwestern Division to discuss operation of the Mainstem Reservoir System.
9. 29 November 2000 – Omaha, NE – The Commander of the Northwestern Division met with the Chairman of the Three Affiliated Tribes to discuss issues identified by the Fort Peck Tribe, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, Winnebago Tribe, Omaha Tribe and the Fort Berthold.
10. 6 December 2000 – Prairie Nights Casino, Ft. Yates, ND – Great Plains Regional Tribal Leaders Council meeting
11. 27 June 2001 – Bismarck, ND – Information and Listening Meeting with the Basin Tribes, Corps representatives including the ASA(CW), Northwestern Division Commander and Omaha District Commander, USFWS, and BIA.
12. 12 September 2001 - Bismarck, ND – Tribal Master Manual Orientation Conference
13. 8 January 2002 - Rapid City, SD – Mni Sose Intertribal Water Rights Coalition Annual 2002 Board of Directors meeting, attended by COL Kurt F. Ubbelohde.

### **Tribal Summits**

1. 23-24 February 1999 – Rapid City, SD
2. 27 June 2001 – Bismarck, ND
3. 16 April 2002 – Rapid City, SD